

Customs Bulletin

Regulations, Rulings, Decisions, and Notices
concerning Customs and related matters



and Decisions of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 26

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, June 22, 1992.

The following are decisions of the United States Customs Service determined to be of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 92-21)

This ruling holds that the dutiable value of non-privileged foreign components assembled into automobiles in a foreign trade zone includes the value of assists provided the manufacturer for use in production. The dutiable value of the nonprivileged foreign components is determined by excluding the costs specified in 19 CFR 146.65(b)(2) from the total zone value.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 26, 1991.

File: HQ 544250
VAL CO:R:C:V 544250 VLB
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
MILWAUKEE DISTRICT
6269 Eighth Industrial Drive
Cudahy, Wisconsin 53110

Re: Application for further review of protest No. 3701-8-000119 concerning the dutiable value of nonprivileged foreign components assembled into automobiles in a foreign trade zone.

DEAR SIR:

General Motors Corporation ("GM") has filed an Application for Further Review of protests involving the proper dutiable value of non-

privileged foreign components (Japanese transaxles and Mexican radios) withdrawn by General Motors Corporation ("GM") from foreign trade subzones in Wisconsin and Ohio. The components were assembled into automobiles while in the zones. These protests are being reviewed and ruled upon simultaneously. For your information, the Headquarters Letter Ruling (HRL) addressing the dutiable value of the components that were withdrawn from trade zones in Ohio is HRL 555053.

In both protests, GM provided tooling assists to the related transaxle manufacturer for use in the production of the transaxles. The tooling assists for the transaxles amounted to approximately \$110.00 each. GM purchased the transaxles for \$448.45 each.

GM provided material and tooling assists to the related radio manufacturer for use in production of each radio. The amount of the assists ranged from \$109.10 to \$222.08. GM purchased the radios at \$2.31 to \$3.81 each.

Upon the transfer of the automobiles from the zone, duty was paid on the "dutiable value" of the imported components, *i.e.*, the transaxles and the radios. You and the District Director in Cleveland determined that the dutiable value of the automobile components included the value of the assists. GM has protested this determination.

Issue:

Whether the dutiable value of nonprivileged foreign components assembled into automobiles in a foreign trade zone includes the value of assists provided to the component manufacturers.

Law and Analysis:

Under 19 U.S.C. 81c(a), articles that are produced or manufactured in a zone and sent into the Customs territory of the United States are subject to the laws and regulations affecting imported merchandise.

Customs authority to appraise imported merchandise is found in 19 U.S.C. 1500(a). Under 19 U.S.C. 1500(a) Customs must ascertain the value of the merchandise under 19 U.S.C. 1401a, using all reasonable ways and means in Customs power. The primary method of appraising imported merchandise is transaction value. Under section 402(b)(1) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a(b)(1); TAA) transaction value is defined as the "price actually paid or payable" for the merchandise plus five statutory additions. One of the statutory additions is "the value, apportioned as appropriate, of any assist". See, section 402(b)(1)(C) of the TAA.

To determine the dutiable value of merchandise withdrawn from a foreign trade zone one must also examine section 146.65(b)(2) of the Customs Regulations. The regulations provide as follows:

Dutiable Value. The dutiable value of merchandise provided for in this section shall be the *price actually paid or payable* for the merchandise in the transaction that caused the merchandise to be admitted into the zone less, if included, international shipment and insurance costs and U.S. inland freight costs. *If there is no such price actually paid or payable, or no reasonable representation of*

that cost, the dutiable value may be determined by excluding from the zone value any included zone costs of processing or fabrication, general expenses and profit and the international shipment and insurance costs and U.S. inland freight costs related to the merchandise transferred to the zone. (emphasis added.)

An examination of these provisions addressing the dutiable value of merchandise that is withdrawn from a foreign trade zone reveals that the dutiable value of the merchandise is the "price actually paid or payable", unless there is no reasonable representation of the cost of the merchandise.

In the transactions at issue, GM provided assists to the component manufacturers prior to the time the components were purchased. After the components were manufactured, GM purchased them at a price that did not include the value of the assists.

GM is arguing that under 19 CFR 146.65(b)(2) the dutiable value of the components, or the "price actually paid or payable" for the components is the purchase price of the components. GM further contends that the dutiable value regulations pertaining to merchandise withdrawn from a foreign trade zone do not contain language that requires the addition of the assist.

GM states that it raised its concerns about the regulations when Customs published the Notice of Proposed Rulemaking for the regulations (49 FR 28855, 7-17-84). Specifically, GM stated the following in its comments to the regulations:

As written, this section [proposed 19 CFR 146.65(b)(2)] can be interpreted to mean that the dutiable value of foreign status merchandise excludes such items as packing cost, selling commission, assists, royalty, or license fees provided for in the Tariff Act of 1930, if not included in the price paid or payable by the operator. For example, if the operator provided tooling to the component manufacturer, the value of the assist would not be part of the dutiable value of the reported component because the price paid or payable for the component to the zone operator would not include it, and the proposed section does not require the assist value to be added.

In its comments, GM went on to propose alternative language that would bring the proposed regulations into conformance with the valuation statute. GM proposed that

[t]he dutiable value of merchandise provided for in this subpart will reflect a value consistent with the requirements of Section 402 of the Tariff Act of 1930, as amended, exclusive of any costs of processing or fabrication incurred in the zone, general expenses and profit, international freight and insurance costs, and U.S. inland freight costs. * * *

Customs response to comments raised about the proposed dutiable value regulation was published in T.D. 86-16; 20 Cus. Bull. 34, 42. Customs stated that the term "total zone value" was a new regulatory term, but not a novel regulatory concept. Customs further stated that section

146.56 "accurately reflects the current Customs position on zone valuation matters".

The determination of total zone value under 19 CFR 146.56(b)(1) references sections 402 and 500 of the TAA (19 U.S.C. 1401a and 1500) in the following manner:

The total zone value of merchandise provided for in this section will be determined in accordance with the principles of valuation contained in sections 402 and 500 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a, 1500). The total zone value shall be that price actually paid or payable to the zone seller in the transaction that caused the merchandise to be transferred from the zone. (emphasis added.)

You and the District Director in Cleveland denied GM's protests. You are taking the position that the transfer prices between the related component manufacturers and GM do not reflect the dutiable value of the components. The reasoning is that the transfer prices are not a reasonable representation of the cost of the components. thus, under the regulation, when there is no reasonable representation of the price actually paid or payable, the dutiable value is determined by ascertaining the total zone value and then excluding the specified costs incurred within the zone.

In order to determine whether there is a reasonable representation of the cost of the components, we must, pursuant to the previously cited provision of the foreign trade zone statute (19 U.S.C. 81c(a)), look to the laws that are applicable to imported merchandise. Thus, for appraisal, we must look to the principles of valuation in the TAA (19 U.S.C. 1401a).

Under the principles of transaction value, the value of the transaxles would be approximately \$558.45, which represents the sum of the price GM paid, \$448.45, and the amount of the assist \$110.00. Thus, if the transaxle was imported into the U.S. without going through the foreign trade zone the cost of the transaxles for valuation purposes would be approximately \$558.45 each.

However, GM is arguing that because the transaxles were admitted into a foreign trade zone prior to being imported into the U.S., the value or cost of the transaxle should be only \$448.45, a value that is nearly 20% lower than the value determined under the principles of transaction value. This amount clearly is not a reasonable representation of the amount it cost GM to procure the transaxle. Moreover, GM's interpretation of 19 CFR 146.65(b)(2) would create a result that is contrary to the foreign trade zone statute and the TAA.

Similarly, under the principles of transaction value the cost or value of the radios would range from \$111.41 to \$225.89. These values represent the amount (\$2.31 to \$3.81) GM paid, including the amount of the assists (\$109.10 to \$222.08). Thus, if the radios were imported directly into the U.S. the cost of the radios for valuation purposes would range from \$111.41 to \$225.89 each.

Nevertheless, GM argues that the dutiable value of the radios should range from \$2.31 to \$3.81 each, values that are nearly 98% lower than the value determined under the principles of transaction value. Once again, the amount that GM argues should be the dutiable value of the components, clearly is not a reasonable representation of the amount it cost GM to acquire the components. Furthermore, GM's interpretation of the dutiable value regulation when applied to the appraisement of the radios would produce a result that is inconsistent with the foreign trade zone statute and the TAA.

As a result, the dutiable value of the transaxles and the radios must be determined by excluding the costs specified in 19 CFR 146.65(b)(2) from the total zone value.

Holding:

The dutiable value of the nonprivileged foreign components includes the value of the assists provided by GM.

You are directed to deny the protest. A copy of this decision should be attached to Form 19, notice of action, to be sent to the protestant.

JOHN DURANT,

Director,

Commercial Rulings Division.

(C.S.D. 92-22)

This ruling holds that handbags made in Haiti entirely of U.S. origin PVC or foreign PVC cut to pattern shapes in the U.S. are eligible for duty-free treatment under U.S. Note 2(b), subchapter II, Chapter 98, HTSUSA provided appropriate documentation is submitted at the time of importation.

DEPARTMENT OF THE TREASURY,

U.S. CUSTOMS SERVICE,

Washington, DC, August 26, 1991.

File: HQ 556055

CLA-2 CO:R:C:S 556055 WAW

Category: Classification

KENNETH H. KEEFE, ESQ.

SANDLER, TRAVIS & ROSENBER, P.A.

The Waterford

5200 Blue Lagoon Drive

Miami, FL 33126-2022

Re: Eligibility for duty-free treatment under U.S. Note 2(b), subchapter II, Chapter 98, HTSUSA, of polyvinyl chloride handbags from Haiti; 555803; 555742; 067823; 555189; C.S.D. 89-27(4); 554929.

DEAR MR. KEEFE:

This is in reference to your letter of May 20, 1991, in which you request a ruling, on behalf of Jaclyn, Inc., on the applicability for duty-free

treatment of polyvinyl chloride (PVC) handbags to be imported from Haiti, pursuant to section 222 of the Customs and Trade Act of 1990 (Public Law 101-382), which amended U.S. note 2, subchapter II, Chapter 98, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). No sample was submitted for our review. In addition, you submitted further information on June 26, 1991, concerning the cutting operations performed on the PVC in the U.S.

Facts:

According to your submission, your client intends to import PVC handbags made entirely of U.S. components which are assembled in Haiti, as well as handbags made from PVC material of foreign-origin which is die cut to various pattern shapes in the U.S. and subsequently assembled in Haiti into vinyl handbags. In both cases, you request a ruling on the eligibility for duty-free treatment under U.S. Note 2(b), subchapter II, Chapter 98, HTSUSA, ("Note 2(b)") for the PVC handbags.

Issue:

(1) Whether the handbags made entirely of PVC material of U.S. origin are eligible for duty-free treatment under Note 2(b).

(2) Whether the PVC handbags made of foreign-origin PVC which has been cut to shape in the U.S. are eligible for duty-free treatment under Note 2(b).

Law and Analysis

Section 222 of the Customs and Trade Act of 1990 (Public Law 101-382) amended U.S. Note 2, subchapter II, Chapter 98, HTSUSA, to provide for the duty-free treatment of articles (other than textile and apparel articles, petroleum and petroleum products) which are assembled or processed in a Caribbean Basin Economic Recovery Act (CBERA) beneficiary country (BC) wholly of fabricated components or ingredients (except water) of U.S. origin. This amendment was effective with respect to goods entered on or after October 1, 1990.

Note 2(b) provides as follows:

(b) No article (except a textile article, apparel article, or petroleum, or any product derived from petroleum, provided for in heading 2709 or 2710) may be treated as a foreign article, or as subject to duty, if—

(i) the article is—

(A) assembled or processed in whole of fabricated components that are a product of the United States, or

(B) processed in whole of ingredients (other than water) that are a product of the United States, in a beneficiary country; and

(ii) neither the fabricated components, materials or ingredients, after exportation from the United States, nor the article itself, before importation into the United States, enters the commerce of any foreign country other than a beneficiary country.

As stated in this paragraph, the term "beneficiary country" means a country listed in General Note 3(c)(v)(A).

Although Note 2(b)(i)(A) and (B) are separated by the word "or," it is our opinion that Congress did not intend to preclude free treatment under this provision to an article which is created in a BC *both* by assembling and processing U.S. fabricated components *and* by processing U.S. ingredients.

Pursuant to General Note 3(c)(v)(A), HTSUSA, Haiti has been designated as a BC for CBERA purposes. Note 2(b) specifies four categories of products which are excluded from duty-free treatment under this provision: textile articles; apparel articles; petroleum; and certain products derived from petroleum. The PVC handbags are not an apparel or textile article as contemplated by Note 2(b) and, therefore, are eligible for duty-free treatment under this provision provided that all of the other requirements are satisfied. See Headquarters Ruling Letter (HRL) 555742 dated November 5, 1990.

In regard to the first process you describe, you state that the importer will use 100% U.S.-origin components and ingredients during the foreign manufacturing operation in Haiti. We believe that the operations to be performed in Haiti, which consist of assembling the U.S. PVC materials which have been cut to different shapes and sizes in the U.S., are encompassed by the operations specified in Note 2(b)(i). See HRL 555803 dated March 8, 1991. Therefore, if, in fact, all raw materials are entirely of U.S. origin and the finished articles are shipped directly to the U.S. without entering into the commerce of any foreign country other than a BC, and the applicable documentation requirements are satisfied, the PVC handbags will be entitled to duty-free treatment under Note 2(b).

The question presented in the second scenario you describe is whether the cutting operations performed on the foreign-origin PVC material in the U.S. substantially transforms the material into a "product of" the U.S. Customs has held that a textile article or material usually will be a product of a particular country if the cutting of the fabric into parts and the assembly of those parts into the completed article have occurred in that country. With respect to whether the cutting of fabric to shape, in and of itself, changes the fabric's country of origin, we have consistently held that such an operation constitutes a substantial transformation if the cutting creates defined patterns or shapes suitable for use as components in an assembly operation. See HRL's 555742 dated November 5, 1990, 067823 dated June 2, 1982, 555189 dated June 12, 1989, and C.S.D. 89-27(4) (HRL 554929 dated November 3, 1988). Therefore, with respect to the facts in this case, we find that the foreign PVC which is die cut to shape in the U.S. into various shapes and sizes necessary to construct the handbags in Haiti, is substantially transformed into a "product of" the U.S. Articles which are wholly made of U.S. component materials or ingredients are eligible for duty-free treatment under Note 2(b). Accordingly, if the finished handbag is shipped

directly to the U.S. without entering into the commerce of any foreign country other than a BC, and the applicable documentation requirements are satisfied, the handbags made of foreign-origin PVC which has been substantially transformed into a "product of" the U.S. will be entitled to duty-free treatment under Note 2(b).

We have enclosed a copy of Headquarters telex 9264071 dated September 28, 1990, to Customs field offices, setting forth procedures for the entry of articles under Note 2(b).

Holding:

The PVC handbags which are made in Haiti entirely of U.S. origin PVC or foreign origin PVC which has been cut to pattern shapes in the U.S. may enter the U.S. duty-free pursuant to Note 2(b), provided the documentation requirements set forth in the attached telex are satisfied.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92-23)

This ruling holds that articles of fur or fur goods exported for purposes of display at a fur show are eligible for duty-free treatment under subheading 9801.00.60, HTSUS, when returned to the United States after exhibition.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, October 22, 1991.

File: HQ 556092
CLA-2 CO:R:C:S 556092 LS
Category: Classification
Tariff No.: 9801.00.60

MARILYN-JOY HEINTZ, ESQ.
TOMPKINS & DAVIDSON
One Astor Plaza
1515 Broadway
43rd Floor
New York, New York 10004

Re: Applicability of subheading 9801.00.60, HTSUS, to fur articles exported to Canada for display at fur show; "public" fair; admission policy; 221961; 222792; 067426; clarification of 092277.

DEAR MS. HEINTZ:

This is in response to your letter of June 10, 1991, on behalf of Trans-Border Customs Services, Inc. ("Trans-Border"), requesting a ruling as

to whether certain fur goods are eligible for duty-free treatment under subheading 9801.00.60, Harmonized Tariff Schedule of the United States (HTSUS), when returned to the U.S., after exhibition at a fur show in Canada. In response to our request for further information, you presented additional facts in a letter dated August 22, 1991. A meeting was held at Customs Headquarters on September 23, 1991.

Facts:

The following facts are contained in your letter of June 10, 1991. One of Trans-Border Customs Services Inc.'s ("Trans-Border") customers will be exporting fur goods (*e.g.*, skins, fur-trim garments, fur coats), of both U.S. and foreign origin, to Canada from the U.S. for display at an annual "fur show." You specifically state that the fur articles will be displayed by the exhibitors for the purpose of soliciting sale orders from attendees. The fur show, which is sponsored by an organization of fur manufacturers, will have approximately 500 to 600 exhibitors who are primarily fur manufacturers or their sales representatives. Attendance will be restricted to members of the "fur industry," *e.g.*, buyers for wholesale and retail fur stores. Advance registration will be required, and proof of registration and proper identification must be shown at the door.

At the meeting held at Customs Headquarters, you agreed that, for purposes of this ruling, the following facts should be assumed. Although you stated in your original letter that attendance at the fur show is restricted to members of the fur industry, you now modify this statement and agree that the admission policy is restricted only to the extent that attendees must have a reasonable business interest in attending the show. For example, you state that anyone who is not yet a member of the fur industry, but has an interest in becoming such a member, would not be denied admission to the show. Admission to the show is not restricted to members of a private trade association. Preregistration is being required because of certain space limitations of the show's facility. The show is being advertised through trade or professional journals, as well as invitations or letters sent to prospective attendees. You reiterate that the purpose of the show is to exhibit new styles of fur articles and that, in connection with that purpose, orders will be taken. However, no items will be actually sold and delivered at the show. Thus, the entire stock of merchandise exported to Canada for the show will be returned to the U.S.

You contend that, based upon the foregoing facts, the fur articles should be entitled to duty-free treatment under subheading 9801.00.60, HTSUS, when they are returned to the U.S. at the conclusion of the fur show. You assert that application of this tariff provision is not restricted to fairs and conferences that are open to the "public at large." Instead, you contend that articles should remain eligible for entry under subheading 9801.00.60, HTSUS, so long as they are exhibited at trade fairs and conferences which are open to (1) members of a specific industry or trade, and (2) anyone else who has a reasonable business interest in at-

tending the event. In support of your position, you contend that the word "public," as used in subheading 9801.00.60, HTSUS, only modifies the word "exposition," not the words "fair" and "conference." You also cite to several previous Headquarters Ruling Letters (HRL's) which will be discussed below.

Issue:

Whether certain fur goods exported from the U.S. to Canada for display at an annual fur show will be eligible for duty-free treatment under subheading 9801.00.60, HTSUS.

Law and Analysis:

Subheading 9801.00.60, HTSUS, (formerly item 802.30, Tariff Schedules of the United States (TSUS)), provides for the free entry of articles which are returned after having been exported for temporary use abroad solely for exhibition or use in connection with any public exposition, fair, or conference, provided such articles are returned by or for the account of the person who exported them.

The Customs Service has addressed the requirements of subheading 9801.00.60, HTSUS, in several rulings. In HRL 067426 dated December 8, 1981, medical equipment was exported to Canada for exhibition and demonstration at a joint meeting of the International Society of Hematology and the International Society of Blood Transfusion. The meeting or conference was open only to members of these two societies, and not to the public at large. Therefore, it was found not to be a "public" conference, within the meaning of item 802.30, TSUS, and entry of the equipment under that provision was precluded.

In HRL 221961 dated May 15, 1990, which was a response to an internal advice request, a corporation exhibited jewelry and semi-precious and precious gemstones at the Hong Kong Watch and Jewelry Fair, and subsequently returned the articles to the U.S. We held that because the primary intention of the importer was to exhibit the goods at the trade fair and return them to the U.S., entry of the goods under subheading 9801.00.60, HTSUS, was not precluded. The fact that a secondary objective of the importer was the acquisition of future orders at the fair did not negate the primary intention of the company at the time of exportation to exhibit its wares. We found that the sole act of taking future orders, without delivery of any goods at the show, was not a sale of goods so as to preclude classification under subheading 9801.00.60, HTSUS. This finding was affirmed in HRL 222792 dated January 10, 1991, which was a reconsideration of HRL 221961. We noted in HRL 222792 that the trade fair's own rules prohibiting sales buttressed the importer's argument that its intent was not to sell goods at the fair.

In HRL 222792, we also tangentially addressed the "public" requirement of subheading 9801.00.60, HTSUS. Even though the Hong Kong Watch and Jewelry Fair was allegedly open only to members of the watch and jewelry trades, we found no indication that the fair excluded the general public. More specifically, we stated that no evidence was pre-

sented, by way of brochures or other tangible proof, that "if the general public showed up at the fair and offered to pay admission (assuming one was needed) they would be excluded." We stated that the general public can be distinguished from those who belong to a private club or association where admission is restricted to members only.

In HRL 092277 dated December 9, 1968, machinery and equipment was to be displayed by sales representatives at an exposition held in conjunction with a nonprofit professional association's convention in Canada, and subsequently was to be returned to the U.S. A registration fee was charged for the convention, and the association targeted its advertising at its members and their guests. However, the association stated that if any person interested in the displayed equipment wished to attend the convention, he or she could do so. Therefore, Customs ruled that the convention was open to the "public" and was not a private sales exposition. Provided the documentary requirements were met, *i.e.*, section 10.66, Customs Regulations (19 CFR 10.66), the equipment would be eligible for duty-free treatment under item 802.30, TSUS, upon its return to the U.S.

Based upon the information you have provided, and the assumed facts, we find that the fur articles are eligible for duty-free treatment under subheading 9801.00.60, HTSUS, when they are returned to the U.S. after exhibition at the fur show in Canada. With respect to the "public" requirement of that provision, we do not agree that the term "public" only modifies the word "exposition," and not the words "fair" and "conference." See HRL 067426 (the term "public" was applied to a medical conference). However, we do agree that a fair or conference may be considered "public" so long as it does not deny admission, for reasons other than space limitation, to persons who have a reasonable business interest in attending the event. The admission policy you have described for the fur show fits within these parameters. You have indicated that the advance registration requirement is presumably imposed because of space limitations of the show's facility. In addition, you have suggested that if space is still available after counting all the pre-registrants, then persons having a reasonable business interest relating to the fair may register at the door. The definition of a fair, as cited in HRL 221961, supports our position that the instant fur show is a "public" fair within the meaning of subheading 9801.00.60, HTSUS. "A fair is an exhibition designed to acquaint prospective buyers or the public at large with the range and quality of currently available or planned products." HRL 221961, citing *Webster's Third New International Dictionary of the English Language*, G. & C. Merriam Co, 1971. We also stated in that ruling that the purpose of a trade fair is "to generate interest in the products displayed and in attracting prospective business," and that this "display of domestic articles abroad at an exhibition promotes U.S. industry for future business and/or manufacturing." The admission policy of this fur show is consistent with these stated purposes of trade fairs.

We believe that our position with respect to the satisfaction of the "public" requirement of subheading 9801.00.60, HTSUS, is consistent with our holding in HRL 067426, *i.e.*, that a conference which was open only to members of two medical societies was not "public" within the meaning of subheading 9801.00.60, HTSUS. You have specifically stated that the fur show does not restrict admission only to members of a private trade association. To the extent that HRL 092277 may be interpreted to mean that a fair or convention is considered to be "public" only if it allows *any* person interested in the displayed merchandise to attend, without having to show a reasonable business interest, we depart from that ruling, and modify it in accordance with the general guidelines set forth in this ruling.

We next consider the other requirement of subheading 9801.00.60, HTSUS, *i.e.*, that the returned articles be exported solely for exhibition or use at a public fair. Based upon the assumption that the primary intent of Trans-Border's customers at the time of exporting the fur articles is to exhibit them at the fur show, and the secondary purpose is to solicit future orders (with no articles actually being sold or delivered at the show), we find that fur articles returned to the U.S. will be eligible for duty-free treatment under subheading 9801.00.60, HTSUS. See HRL 221961, reaffirmed in HRL 222792.

Holding:

For the foregoing reasons, we find that, based upon the information you have provided and the assumed facts, the fur articles are eligible for duty-free treatment under subheading 9801.00.60, HTSUS, when they are returned to the U.S. after exhibition at the fur show in Canada.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92-24)

This ruling addresses the issue of copyright infringement of computer parts (17 U.S.C. 603(c), 19 U.S.C. 1595a(a) and 19 C.F.R. 133.47).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 14, 1991.

CPR-3 CO:R:IT:I 450973 SFW
Category: Copyright

U.S. CUSTOMS SERVICE
DISTRICT DIRECTOR OF CUSTOMS
*300 South Ferry Street, Room 2017
San Pedro, California 90731*

Re: Copyright infringement – IBM MEGA-BIOS XT – Copyright Registration No. TX 1-650-775, published December 13, 1983 – HQ. Issuance No. 86-125, effective June 23, 1986.

DEAR SIR:

Your memorandum, (TCB Case #2720029-1), forwarded the file on Entry No. 764-0030203-0 and requested a Headquarters decision pursuant to section 133.43(c)(1), Customs Regulations (19 C.F.R. 133.43(c)(1)), concerning the alleged infringement of the above-referenced copyright recordation.

Facts:

On September 4, 1990, Trans-Union Customs Service, Inc. filed the entry for a shipment of "computer parts," on behalf of Ocean Office Automation, Inc ("Ocean"). The shipment contained 200 pieces of XT BIOS programs on XT Motherboards. The items were manufactured in Hong Kong and shipped by Ocean's parent company Ocean Office Automation, Ltd.

The entire shipment was released conditionally to the importer on October 1, 1990, pending a determination of admissibility. The Los Angeles Customs Laboratory tested a sample of the XT BIOS program and determined that it contains 17.10% of the IBM MEGA-BIOS program in place and 55.01% MEGA-BIOS overall. The sample was found to display the message "EUROBIOS XT V2.11-T2 (copyright) 1989-90 by EUROSOFT (U.K.) LTD." The BIOS chip is labeled "EUROSOFT Copyright 1984-90 EUROSOFT UK Ltd."

In view of the apparently high degree of similarity between the imported Ocean BIOS program and the IBM BIOS, there was a sufficient basis to order the redelivery of the merchandise. A total of 89 pieces (motherboards and BIOS chips) were redelivered into Customs' custody.

Pursuant to 19 C.F.R. 133.43(a), the merchandise was detained. The importer was notified of the suspected copyright infringement. Ocean and the suspect BIOS' owner, Eurosoft, denied piratical copying.

IBM was notified and provided with a sample of the Eurosoft BIOS program. After testing the program, IBM posted the required surety bond in the amount of \$3,311 and submitted a legal brief and other documents in support of its demand for denial of entry and seizure and forfeiture of the detained motherboards and chips.

The importer and Eurosoft also submitted a brief in support of their position. The entire file was forwarded to Headquarters for a decision on the infringement issue.

Issue:

Whether the EUROSOFT XT BIOS program imported by Ocean Office Automation, Inc. infringes the copyright of the IBM Corporation for the XT MEGA-BIOS?

Law and Analysis:

Section 602(b) of the Copyright Law (17 U.S.C. 602(b)) prohibits the importation of articles that infringe a copyright. Section 603(c) of the Copyright Law (17 U.S.C. 603(c)) provides that such articles are subject to seizure and forfeiture.

The copyright owner must persuade Customs that the items in question are infringing and should not be granted entry into the U.S. 19 C.F.R. 133.43(c)(1). To prove copyright infringement, the complaining copyright owner must establish the existence and ownership of a valid copyright in the item allegedly infringed and unauthorized copying by the defendant that amounts to an unlawful appropriation of the copyrighted work. *Nimmer, Nimmer on Copyright*, Sections 13.01-13.03 (1989).

IBM established the existence and ownership of a valid copyright in the XT MEGA-BIOS by producing a certificate of registration issued by the U.S. Copyright Office.

In the absence of direct evidence, copying may be proved by showing: (1) that the alleged infringer had access to the copyrighted work; and (2) that there are numerous and significant similarities between the copyrighted work and the allegedly infringing work. *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 1232 (1986).

Display Telecommunications Corporation, the original copyright owner, published a source code listing of the MEGA-BIOS in 1983. Although the MEGA-BIOS program code was not as widely available as the IBM Technical Reference Manual which contained the source code for the IBM XT BIOS, it was available. Furthermore, the side-by-side comparison of the MEGA-BIOS Print Screen chapter and the Timer I/O chapter with the corresponding Eurosoft BIOS code produced a figure of 100% similarity. Although Ocean denies access to the IBM code by the authors of the Eurosoft BIOS, we believe access can be inferred in this case.

Copying will amount to infringement when the defendant takes from the copyright owner's work so much of what is valuable to the consuming public that the defendant has unlawfully appropriated that which

rightfully belongs to the copyright owner. Infringement occurs when there is "substantial similarity" between the defendant's work and the *protected expression* of the copyrighted work. Comparisons of overall similarity are not dispositive of the issue of infringement.

When evaluating the substantial similarity of computer programs, it is necessary to eliminate from consideration those elements of the plaintiff's program that are not protected by copyright. IBM must establish that the similarities between its program and the Eurosoft XT BIOS result from substantial, unauthorized copying of protected material, rather than the duplicate use of industry-standard structure, sequence, and organization.

IBM submitted a legal brief and a limited module-by-module comparison of the IBM MEGA-BIOS program and the Eurosoft XT BIOS program. IBM correctly excluded from its analysis all data tables, comments, and other non-operational portions of the MEGA-BIOS. After these exclusions, there remained 1900 lines of code, organized in 14 chapters, relevant to the infringement analysis. This remaining code represents the copyrightable elements of the IBM program.

However, IBM further reduced the number of lines of MEGA-BIOS code used in the side-by-side comparison by focusing on 6 "key" chapters (1415 lines) of IBM code and the corresponding Eurosoft XT BIOS instructions. This limited comparison resulted in percentages of similarity in excess of 90% in each module tested.

In previous cases, (HRL 451587, dated August 27, 1991 and HRL 451259, dated September 27, 1991), Customs expressed its concern over IBM's designation of "key" modules and its limiting the substantial similarity analysis to them. In those cases, we interpreted the law to require the copyright owner's comparison to include all the copyright-protected elements of its program.

We reiterate our position that a copyright owner can establish copying that amounts to infringement only by demonstrating substantial similarity between the protected code in its program and the code in the allegedly infringing program. Neither overall similarity nor similarity between a few selected portions of the copyright owner's and the suspect programs are dispositive of the issue of infringement.

Courts have held that infringement will be found in cases in which only a few qualitatively significant elements of a work are copied. See *SAS Institute, Inc. v. S&H Computer Systems Inc.*, 605 F.Supp. 816 (N.D. Tenn. 1985). However, Customs cannot allocate the time or the resources that courts do to resolve the intricate issues of whether particular routines, subroutines, or other component parts of computer programs are ideas, procedures, processes, systems, methods of operation, concepts, principles, discoveries, "scenes a faïces," or expression. Therefore, it is imperative that the copyright owner carry its burden of proof by clearly and convincingly establishing the unlawful appropriation of protected material. The least deceptive manner in which this can

be achieved is through a straight-forward comparison between the suspect program and the protected elements of the copyright owner's work.

In the interest of determining the truth, however, we offer the following "compromise." If, upon analyzing all protected code, the copyright owner believes that the percentage of similarity between the programs does not reflect adequately the extent or severity of the copying by the suspect program, the copyright owner may supplement its case. It may do so by designating the "qualitatively significant" modules—those that exhibit a greater level of creativity or perform a more important task than other groups of code. The copyright owner may argue that, although there is a marginal percentage of similarity between the protected code and the suspect code, a high percentage of duplication in the designated modules demonstrates unlawful appropriation and, hence, infringement.

The IBM laboratory and the Customs laboratory achieved different results. The IBM MEGA-BIOS program consists of approximately 1900 lines (14 chapters) of copyright-protected instructions eligible for comparison. IBM's analysis focused on 1415 lines (6 chapters). This restricted analysis produced percentages of similarity greater than 90% between the selected IBM instructions and the corresponding Eurosoft code. The Customs laboratory results showed 55.01% similarity, significantly lower than the IBM figure. Furthermore, the Customs analysis did not exclude standard industry instructions. Therefore, the actual percentage of similarity between the protected elements of the IBM program and the Eurosoft BIOS probably is even lower than 55.01%.

Although neither the Customs nor the IBM laboratory reports were conclusive on the percentage of similarity between the protected elements of the MEGA-BIOS program and the Eurosoft program, we are convinced by IBM's presentation of the evidence that copying did occur.

The importer presented an interesting argument in its brief. Ocean correctly states that copyright law protects the particular expression of an idea, not the idea itself. Ocean also correctly points out that where an idea has no or few other methods of being expressed, the idea/expression dichotomy dissolves and the two are "merged." This concept is known as the "merger doctrine."

The merger doctrine can operate either to deny copyright protection to a work or to limit the scope of protection. This doctrine is particularly relevant to determinations of computer program infringement.

According to Ocean's interpretation of the merger doctrine, the author of the Eurosoft BIOS was entitled to copy certain sections of the IBM program because, with respect to those chapters, the scope of available protection is limited. For example, two of the copyright-protected modules of IBM code were copied in their entirety by the Eurosoft BIOS. Under the theory advanced by the importer, this is allowed because there are limited ways to express the functions accomplished by those IBM modules.

We disagree with the importer's interpretation. First, in order to apply the merger doctrine, we must be convinced that there are few other ways of expressing certain ideas represented in the two programs. While this is undoubtedly true for some of the modules, we doubt that there is only one way to write code to achieve the "Timer Input/Output" function or the "Print Screen" function, both of which the importer copied 100%. Although Customs recognizes that authors of computer programs are constrained by several external factors when writing a program, we do not believe that the EUROBIOS author was restricted to that set of commands. Second, in evaluating a claim of infringement, the merger doctrine requires that the adjudicating party find infringement only where the defendant appropriates to a substantial degree, either qualitatively or quantitatively, nonmerged expression. By highlighting particular modules for analysis, IBM has represented that those lines of code are protected, nonmerged expression. Therefore, the EUROBIOS program has appropriated, to a substantial degree, expression that has not merged. For the above reasons, we do not agree that the merger doctrine operates to negate liability in this case.

We also wish to point out that, although the Eurosoft BIOS is itself protected by copyright, a copyright registration certificate acquired prior to importation is subject to question and may be disregarded when other evidence indicates piratical copying. Customs Service Decision 86-23.

Based on the evidence presented by IBM and the failure of the importer to present any persuasive arguments on its behalf, we conclude that the author of the version of the Eurosoft BIOS imported by Ocean Automation Inc. unlawfully appropriated an amount of the IBM MEGA-BIOS program sufficient to constitute copyright infringement.

The importer presented copies of agreements that may affect the degree of its liability in this case. The first is an assignment between John W. A. Street, the EUROBIOS program author, and Systems Constructors, Ltd., the forerunner of Eurosoft, Ltd. The agreement allegedly was executed on August 1, 1989. In the agreement, Mr. Street covenants that he is the sole author of the software, that it is wholly original, and that nothing in it infringes the copyright of any third party. The second is a license agreement between Eurosoft (UK) Ltd. and Ocean Office Automation Ltd., the parent company of the importer, which grants ocean Automation Ltd. a nonexclusive, nontransferable, worldwide license to reproduce and distribute each licensed program (Eurosoft XT BIOS) according to the terms of the agreement. The license allegedly was signed on April 12, 1990.

The Customs Regulations specify that articles seized and forfeited pursuant to 19 C.F.R. 133.42(c) shall be destroyed. However, the articles may be returned to the country of export if the importer can establish, to the satisfaction of the district director, that it had no reasonable grounds for believing that its acts constituted a violation of law. 19 C.F.R. 133.47. If the BIOS program resident on the imported chips is the

same program that was licensed to Ocean Automation Ltd. by Eurosoft, the importer may argue that it had no reasonable grounds for believing that its actions constituted a violation of law. If, however, the importer altered the program to produce the infringing BIOS, the license agreement will not shield Ocean from liability.

Holding:

We hold that the copyright owner has carried its burden of proof vis-a-vis the importer. We find that the Eurosoft XT BIOS infringes Copyright Registration No. TX 1-650-775 IBM XT MEGA-BIOS. The computer chips containing the infringing program are subject to seizure and forfeiture under 17 U.S.C. 603. The motherboards containing the chips are subject to seizure and forfeiture as conveyances under 19 U.S.C. 1595a(a). However, if it is shown, to the satisfaction of the district director, that the importer had no reasonable grounds for believing that its actions constituted a violation of law, the articles may be returned to the country of export pursuant to 19 C.F.R. 133.47. The bond filed shall be returned to the copyright owner. Copies of this decision shall be furnished to all parties in interest.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

(C.S.D. 92-25)

This ruling holds that certification procedures as defined in 19 U.S.C. 1304 and 19 CFR 134.26 for the marking of repackaged articles may not be used by an importer to satisfy his obligations if the goods are not correctly marked or excepted from marking at the time of importation.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 20, 1991.

File: HQ 734230
MAR-2-05 CO:R:C:V 734230 NL
Category: Marking

DISTRICT DIRECTOR
U.S. CUSTOMS SERVICE
P.O. Box 619050
1205 Royal Lane
Fort Worth, TX 75261

Re: Country of origin marking-repacking certifications; 19 CFR 134.26;
T.D. 84-12 7; 19 CFR 134.25; 19 CFR 134.34; C.S.D. 91-16.

DEAR SIR:

This is in response to the request of the Dallas/Fort Worth Field National Import Specialist dated June 24, 1991, for internal advice con-

cerning the applicability of certain regulations concerning country of origin marking which appear in Part 134, Customs Regulations (19 CFR Part 134).

Facts:

An importer, the Brinkmann Corporation, has filed with Customs in Dallas/Fort Worth a certification reciting the language which appears at section 134.26(a), Customs Regulations (19 CFR 134.26(a)). The certification relates to articles imported without country of origin marking. The Field National Import Specialist believes that the 19 CFR 134.26(a) certification procedures are applicable only to articles which are legally marked at the time of importation, and describes the instant situation as representative of a continuing problem for Customs at Dallas/Fort Worth. Accordingly, he requests internal advice concerning the applicability of 19 CFR 134.26(a).

Issue:

Whether, if goods are imported without proper country of origin marking, the importer may be deemed to have satisfied the marking requirements by following the procedures set forth at section 134.26, Customs Regulations (19 CFR 134.26).

Law and Analysis:

Section 134.26(a) provides that if an article subject to country of origin marking is intended to be repacked after its release from Customs custody, or the district director having custody of the article has reason to believe that the article will be repacked after its release, the importer shall certify to the district director that: 1) if the importer does the repacking, "*he shall not obscure or conceal the country of origin marking appearing on the article*, or else the new container shall be marked to indicate the country of origin of the article* * *" [emphasis added]; or 2) that if he does not repack the article he will give notice to subsequent purchasers or repackers of their obligations under section 19 U.S.C. 1304 and Part 134, Customs Regulations.

As the emphasized language makes clear, the procedures set forth at 19 CFR 134.26 apply only to articles which are legally marked at the time of importation; *i.e.*, marked so as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Thus, an importer may not import unmarked or improperly marked goods and secure their release by executing a certification pursuant to 19 CFR 134.26. This provision does not apply to articles imported in bulk, not individually marked, which are to be repackaged after importation for retail sales to ultimate purchasers, unless they are otherwise excepted from country of origin marking. If the articles are not legally marked at the time of importation, the presentation to Customs of the certification and notice to subsequent purchasers or repackers specified in 19 CFR 134.26 will not serve to satisfy the importer's obligations under 19 U.S.C. 1304 and Part 134, Customs Regulations.

The decision which implemented 19 CFR 134.26, T.D. 84-127, 18 *Cust. B. & Dec.* 324 (1984), stated that the purpose of the provision was to "minimize the practice of concealing country of origin information on repacked marked articles". The authority to require certification is based upon the principle that if Customs has reason to believe that an article legally marked at the time of importation will not reach its ultimate purchaser in that condition, Customs may find that the marking of the article at the time of importation does not satisfy the requirements of 19 U.S.C. 1304 and Part 134, Customs Regulations. See, *U.S. Wolfson Bros. Corp. v. United States*, 52 CCPA 46, C.A.D. 856 (1965). There is nothing in either the regulation or T.D. 84-127 to indicate that Customs will deviate from its responsibility under 19 U.S.C. 1304 to require that all articles of foreign origin must, unless excepted, be marked at the time of importation. As indicated above, Customs must be satisfied at that time that the article will reach the ultimate purchaser in a marked condition.

In sum, the certification procedures of 19 CFR 134.26 apply only to articles which are legally marked at the time of importation and which may be repacked in such a manner that the marking appearing at the time of importation could be concealed or obscured. The procedures generally are not applicable, for example to unmarked articles imported in bulk which are to be repacked for retail sale.

It is noted that a similar certification procedure is set forth at section 134.25, Customs Regulations (19 CFR 134.25), which may apply to articles imported in bulk without marking. Such articles are those included in the "J-List" (19 CFR 134.33) and articles incapable of being marked within the meaning of in CFR 134.32(a). Under 19 CFR 134.25, the importer certifies that after repacking in the U.S. the new containers will be marked in accordance with the requirements of Part 134.

For unmarked articles not included within the scope of 19 CFR 134.25, a separate procedure under 19 CFR 134.34 is available to importers. Under that provision, an exception from individual country of origin marking may be authorized *in the discretion of the district director* pursuant to 19 CFR 134.32(d), provided that the articles are repacked after importation under the supervision of the district director such that the marking on the new containers will indicate the articles' country of origin to their ultimate purchasers. Thus, although the requirements for exception from marking are not satisfied at importation, they are met after repacking under Customs supervision in the U.S. The district director retains broad discretion concerning whether the exception should be granted, and to specify the types of supervision required, which may include direct inspection, the submission of verifications or samples, or such other demonstration of compliance as the district director may require. It is noted that the district director may, under the authority of 19 CFR 134.34, require an importer to provide certification that new containers will be marked in accordance with Part 134; such certification may contain the same language as that set forth at 19 CFR

134.25. In cases in which the importer is not the repacker, the district director may require such assurances as he deems necessary to assure that others will repack the articles in such a manner as to satisfy all the requirements of 19 U.S.C. 1304 and Part 134, Customs Regulations.

In general, an importer wishing to proceed under 19 CFR 134.34 should secure the approval of the district director in advance of importation. Absent such advance approval, Customs' usual procedure for articles imported without markings is to issue a Notice of Marking/Redelivery (CF 4647). Accordingly, an importer who plans to import articles in bulk for retail packaging would be well-advised to proceed in one of two ways with respect to country of origin marking: (1) make certain that at importation all the articles are marked so as to indicate their country of origin to the ultimate purchaser in the U.S., or are otherwise eligible to be excepted from country of origin marking; or (2) secure the approval of the district director to repack and mark after importation pursuant to 19 CFR 134.34.

It is relevant in this regard to restate that Customs disapproves of the routine presentation for entry of articles which the importer without prior Customs approval plans to mark after importation. As discussed in C.S.D. 91-16, 22 *Cust. B. & Dec.* No. 32 (August 7, 1991), clarified in HQ 734291 (August 26, 1991), Customs officials are authorized to take a number of steps against importers who habitually fail to comply with the country of origin marking requirements, including, after appropriate warnings, seizure under 19 U.S.C. 1595a(c). See Customs Directive 4400-04 (May 11, 1987), and Telex dated December 8, 1988.

Holding:

The purpose of 19 CFR 134.26 is to assure that goods which are legally marked at importation will not be repacked after importation in such a manner as to conceal or obscure country of origin markings. The certification procedures set forth therein may not be used by an importer to satisfy his obligations under 19 U.S.C. 1304 and Part 134, Customs Regulations if the goods are not legally marked or excepted from marking at the time of importation.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92-26)

This ruling concerns the proper country of origin marking requirements for certain stuffed toys; production of which involves processing operations occurring in two countries (19 U.S.C. 1304, 19 CFR 134.1(b)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 6, 1992.

File: HQ 734193
MAR-2-05 CO:R:C:V 734193 AT
Category: Marking

PATRICK D. GILL, Esq.
RODE & QUALEY
295 Madison Avenue
New York, New York 10017

Re: Country of origin marking of imported stuffed toys; substantial transformation; cutting of fabric in Korea and sewing assembly in China.

DEAR MR. GILL:

This is in response to your letters of May 13 and September 6, 1991, on behalf of Gund, Inc., requesting a ruling on the country of origin of imported stuffed toys. A finished stuffed polar bear, as well as the components as they exist at the conclusion of each major stage in the production process were submitted for examination.

Facts:

You state that Gund, Inc. intends to import stuffed toys from Korea. You also state that the production of the stuffed toys will involve processing operations performed in two countries, Korea and China. The operations to be performed in Korea will consist of the cutting of Korean fabric into approximately 12 pieces which form the stuffed toy skin. These 12 pieces will then be exported to China where they will be sewn together into the skin for the stuffed toy. The skins will then be sent back to Korea where they will be stuffed with Korean stuffing material, sewn closed, the eyes and nose will be sewn on and packaged for shipment to the U.S. You state that the operations performed in Korea represent approximately 80 percent of the total value of the finished stuffed toys. You state that the cutting of the Korean fabric into the 12 pieces in Korea constitutes a substantial transformation and that the sewing operation performed in China does not. Based on this you contend that the country of origin of the stuffed toys is Korea.

Issue:

What is the country of origin of the imported stuffed toys that are processed under the conditions described above?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that unless excepted, every article of foreign origin imported

into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlander & Co.*, 27 C.C.P.A. 297 at 302; C.A.D. 104 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and the exceptions of 19 U.S.C. 1304. Section 134.1(b), Customs Regulations (19 CFR 134.1(b), defines "country of origin" as the country of manufacture, production or growth of any article of foreign origin entering the U.S. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of Part 134. A substantial transformation occurs when articles lose their identity and become new articles having a new name, character, or use. *Koru North America v. United States*, 12 CIT 1120, 701 F.Supp. 229 (1988). The question of when a substantial transformation occurs is a question of fact to be determined on a case-by-case basis. *Uniroyal Inc. v. United States*, 3 CIT 220, 542 F.Supp. 1026 (1982), *aff'd*, 1 Fed.Cir. 21, 702 F.2d 1022 (1983). (Although the stuffed toys consist of textile materials, the rules for determining the country of origin for textile products set forth in section 12.130 are not applicable because they are classified outside of section XI, HTSUS and they are not subject to quota).

In determining whether the assembly of parts or materials constitutes a substantial transformation, the issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. *Belcrest Linens v. United States*, 6 CIT 204, 573 F.Supp. 1149 (1983), *aff'd*, 2 Fed.Cir. 105, 741 F.2d 1368 (1984). Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. *See*, C.S.D.s 80-111, 85-25, 89-110, 89-118, 89-129 and 90-97.

In HQ 734214 (November 18, 1991), we considered whether the assembly in China of Taiwanese fishing rod components constituted a substantial transformation and found that it did not, stating that the assembly of all the foreign components in China did not result in the manufacture of a new and different article in that the assembly operation was simple, the foreign component parts did not lose their identity (no change to the physical dimensions of the components occurred) and the assembly operation added only 15 percent to the total value of the finished fishing rods. Accordingly, we ruled that the country of origin of

the fishing rods was the place where the components were made "Taiwan" and not the place where the simple assembly took place "China".

Similarly, in this case, we find that the sewing in China of the 12 pieces of fabric into the stuffed toy skin does not constitute a substantial transformation of the Korean fabric pieces. Like the fishing rod assembly in HQ 734214, the extent of the operations performed in China is simple in that it requires the sewing of only 12 small pieces of fabric, the 12 pieces of fabric do not lose their identity (no change to the physical dimensions of the fabric pieces occur as a result of sewing them together) and the assembly operation adds only 20 percent of the total value of the finished stuffed toy which we consider to be relatively low. Accordingly, the country of origin of the stuffed toys is Korea.

Holding:

The country of origin of the imported stuffed toys processed in the manner described above is Korea.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92-27)

This ruling holds that an analysis of whether a screen cabin tent is of plastic or textile is dependent on which of these components impart the essential character to the subject merchandise.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, February 10, 1992.

File: HQ 089449
CLA-2 CO:R:C:T 089449 HP
Category: Classification
Tariff No.: 6306.22.9030

MS. KATHLEEN M. HAAGE
AREA DIRECTOR
U.S. CUSTOMS SERVICE
Airport International Plaza
Newark International Airport
Newark, NJ 07114

Re: Request for Internal Advice Number 25/91. Screen house. Cabin tent. made up; plastics; textiles; Gore-Tex®; essential character; GRI 1.

DEAR MS. HAAGE:

This is in reply to your memorandum of April 18, 1991, requesting internal advice on the tariff classification of a screen/cabin tent imported from Taiwan. Please reference your file CLA-1-01-N:TB CF.

Facts:

The merchandise at issue consists of 15' x 9' two-room screen/cabin tent, Style 4663, Nelson/Weather-Rite, Inc. One room forms a 9' x 6' screen house which provides an insect-free area for eating, playing, and relaxing. The 9' x 9' second, or cabin room constitutes the sleeping and private dressing area. The roof of the structure and the walls of the cabin area are made of woven polyethylene strips covered on both sides with a visible plastics coating. The sides of the screen house portion and three large windows of the cabin area are made of polyethylene screening in the form of a textile mesh. The windows have a closable plastic covering. The structure is supported by means of a zinc-coated steel framework and poles with chain cords. There is a floor in the cabin area, made of the same material as the roof. All of the components, along with plastic stakes, are packed inside a storage/carrying bag.

It is the position of the internal advice applicant, per counsel Barnes, Richardson & Colburn, that the walls, roof, floor and room divider impart the essential character of the article, and that the article should be classified as an article of plastics.

Issue:

Whether the screen/cabin tent is an article of textiles or plastics under the HTSUSA?

Law and Analysis:

Heading 6306, HTSUSA, provides for tents. The Explanatory Notes to this heading define tents as follows:

Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.

Note 1 to Chapter 63, HTSUSA, states that heading 6306 applies only to made up articles of textile fabrics. The screen house/cabin tent consists of three components. First, woven polyethylene strips covered on both sides with a visible plastics coating and making up the roof, cabin floor, and cabin walls. This plastic/textile combination is classifiable in Chapter 39, HTSUSA, since (1) the textile fabric is entirely coated on both sides with plastics, and (2) that plastics coating is visible to the naked eye. See Note 1(h) to Section XI, HTSUSA, and Note 2 to Chapter 59, HTSUSA. The other components of the screen house/cabin tent are the polyethylene screening that is considered a textile, and the steel poles, which are classified under, as indicated above, the provision for tents in Chapter 63, HTSUSA.

The General Rules of Interpretation (GRIs) to the HTSUSA govern the classification of goods in the tariff schedule. GRI 1 states, in pertinent part, that " * * * classification shall be determined according to the terms of the headings and any relative section or chapter notes * * * " Goods which cannot be classified in accordance with GRI 1 are to be classified in accordance with subsequent GRIs, taken in order. Note 1(h) to Section XI, HTSUSA, *excludes* from classification therein articles of Chapter 39. Note 2(1) to Chapter 39, HTSUSA, *excludes* from classification therein goods of Section XI. Counsel has implied that, in order to ascertain whether the instant merchandise is an "article of Chapter 39" or a "good of Section XI," one must determine the essential character (by means of GRI 3) of the tent. Counsel has cited HRL 083789 of March 31, 1988, in support of this argument.

HRL 083789 held neither the side screening nor the nonwoven plastic-coated roof imparted the essential character, under GRI 3(b), of a screen house. *Accord* HRL 084819 of October 5, 1989 (adopting essential character analysis of HRL 083789). These rulings, however, were incorrect to the extent that they specifically introduced GRI 3 at the legal note level as the basis for determining whether the Chapter 63, Note 1 limitation for made-up articles, "of any textile fabric," (and the Note 1(h) to Section XI exclusion of articles of Chapter 39, HTSUSA), included the subject screen houses. Subsequent GRIs cannot be used to modify the intended coverage of a Section or Chapter Note. It is only after merchandise is classified in accordance with these Notes that the remaining GRIs are consulted. *See* HRL 085550 of December 8, 1989 (modifying HRL 083789); *see also* the Explanatory Note to Chapter 39, HTSUSA (stating that classification of textile/plastics combinations is essentially governed by Note 1(h) to Section XI, HTSUSA).

It has been suggested that Customs recent Federal Register publication, *Classification of Garments Composed in Part of Linings or Interlinings of Specialized Fabrics or Nonwoven Insulating Layers*, 56 Fed. Reg. 46372 (September 12, 1991) (*hereinafter* "Gore-Tex® Notice") requires application of GRI 3 to determine whether the instant article is a "good of Section XI, HTSUSA. This is incorrect. The Gore-Tex® Notice held that garments composed in part of specialized fabrics or nonwovens should be classified on the basis of that component of the garment which imparted the essential character under GRI 3(b). Application of GRI 3, however, was *mandated* by relevant legal Notes to Section XI, HTSUSA. These Notes, which apply to either *textile* goods of Chapters 50 to 55 (or headings 5809 or 5902) or articles of two or more textile materials (the tent is composed of only one textile material), are not applicable to the tent at issue.

As a result of the above-stated rationale, we are left with an amalgam of plastic and textile which is simultaneously excluded from the respective plastic (if an article "of textiles") and textile (if an article "of plastic") divisions of the tariff schedule. In addition, neither the HTSUSA nor the Explanatory Notes aid us in determining what is meant by "of

textiles." In our previous screen house rulings, we held that if the textile portion imparted a *significant characteristic* to the tent, the tent would consequently be deemed a textile article. This finding was based in part upon General Note 7(e) to the HTSUSA, which defined, *inter alia*, "in part of" or "containing" as containing "a *significant* quantity of the named material." Emphasis added. Since an article "of textiles" clearly contains at least as much textile as an article "in part of" textiles, and less than an article "wholly of" textiles, a textile portion which imparts a *significant characteristic* must therefore be of a *significant quantity*.

We are now modifying this rationale. Since the term "of", as it is used in the legal notes, is not specifically defined in the tariff schedule or its accompanying Explanatory Notes, it is our opinion that reference to the subsequent GRIs is appropriate to determine the intent of the drafters. Therefore, in an analysis of whether an article is "of" a particular material, that material which imparts upon the good its *essential character* is the material of which the article is constructed.

GRI 3 states, in pertinent part:

When by application of Rule 2(b) [goods of more than one material or substance] or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

* * * * *

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) [which requires that goods be classified, if possible, under the more specific of the competing provisions], shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Explanatory Notes (EN) to the HTSUSA constitute the official interpretation of the tariff at the international level. While not legally binding, they do represent the considered views of classification experts of the Harmonized System Committee. It has therefore been the practice of the Customs Service to follow, whenever possible, the terms of the Explanatory Notes when interpreting the HTSUSA. Explanatory Note (IX) to GRI 3 provides:

For the purposes of [GRI 3(b)], composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted to one another and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

[C]lassification [of sets and of composite goods] is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.

The factors which determine essential character of an article will vary from case to case. It may be the nature of the materials or the components, its bulk, quantity, weight, value, or the role a material plays in relation to the use of the goods. In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure or condition of an article.

According to Counsel's letter of March 12, 1991, the textile portion of the tent represents 9% of the value of the entire tent; by contrast, the plastics/textile combination portion represents 26% of the tent's value. The textile portion weighs 0.50 kilogram, while the plastics/textile combination weighs 12.7 times more, at 6.35 kilograms. The textile portion covers 17,807.08², while the plastics/textile combination covers 2.65 times more area, at 47,142.87². The figures for the steel poles (the poles are not taken into account, per the EN to heading 6306) are not given.

Although the figures submitted by Counsel show that a substantial proportion of the tent's value, weight and area are taken up by the plastics coated woven polyethylene strips, a meaningful amount of the tent is still made from textiles. In addition, the textile portion of the tent (the screening) extends the living area, keeps out insects, provides some protection against the elements, and allows maximum air circulation. The plastics/textile portion provides additional protection from the weather.

An essential character analysis is not intended to be a mere "numbers game", but, as we stated above, must focus upon "what an article is; that which is indispensable to the structure or condition of an article." Both the plastic and textile portions are extremely important in the use of the tent. Both serve to distinguish what the article is: a primarily plastic cabin tent combined with a primarily textile screen house. It is our opinion, therefore, that *neither* the textile nor the plastic impart the essential character of this article.

GRI 3(c) states that when "[g]oods cannot be classified in accordance with the above rules[, such goods] shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." As the headings of Section XI, HTSUSA, appear after those of Chapter 39, HTSUSA, classification within the former is appropriate.

Subheading 6306.22, HTSUSA, provides for tents of synthetic fibers. Subheading 6306.29, HTSUSA, provides for tents of other *textile* materials. The latter subheading *does not merit consideration*, because the plastics/textile combination is not considered a textile for classification purposes under the HTSUSA. Classification under subheading 6306.22 is therefore required.

For statistical reporting purposes, subheading 6306.22.9010, HTSUSA, provides for screen houses of synthetic fibers. The subject tent is a screen house combined with a cabin tent, and is therefore not classifiable as a mere screen house.

Holding:

As a result of the foregoing, the instant merchandise is classified under subheading 6306.22.9030, HTSUSA, textile category 669, as tarpaulins, awnings and sunblinds; tents; sails for boats, sailboards or landcraft; camping goods, tents, of synthetic fibers, other, other. The applicable rate of duty is 10 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent negotiations and changes, to obtain the most current information available, we suggest that the internal advice applicant check, close to the time of shipment, the STATUS REPORT ON CURRENT IMPORT QUOTAS (Restraint Levels), an issuance of the U.S. Customs Service, which is updated weekly and is available at any local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, the internal advice applicant should contact any local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 92-28)

This ruling sets forth and defines that criterion which must be met in order to constitute a stuffed doll for purposes of tariff classification.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 22, 1992.

File: HQ 086264
CLA-2 CO:R:C:F 086264 STB
Category: Classification
Tariff No.: 9502.10.2000

MR. ARTHUR T. DOWNEY
JOHNSON & GIBBS
1001 Pennsylvania Ave., N.W.
Suite 745
Washington, D.C. 20004

Re: Reconsideration of New York Ruling Letter (NYRL) 847062; Katie and Emma dolls.

DEAR MR. DOWNEY:

This letter is in response to your January 9, 1990 Request for Reconsideration of NYRL 847062, dated December 4, 1989, concerning the

tariff classification of two dolls known as "Katie's Bedtime Story" and "Teatime for Emma." Samples were submitted with your request.

Facts:

In NYRL 847062, dated December 4, 1989, our New York office classified both of the above-referenced dolls under subheading 9502.10.8000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for dolls, representing only human beings, whether or not dressed, other, other, other. The applicable duty rate for that subheading is 12% *ad valorem*.

The first sample we will describe is marketed as "Katie's Bedtime Story." The "Katie" doll is approximately 16 inches (40.5 cm) in height and simulates a little girl situated in a semi-sitting position with her legs crossed. The doll has a porcelain head and face with molded or implanted facial features, synthetic hair and a ribbon in the hair. The porcelain extends down over the neck into a harness that overlaps a portion of the traditionally stuffed torso, front and back. The entire torso is stuffed to distention, and a large majority of this torso is not covered by the overlay. The top of the arms, down to approximately the elbow, and the legs, down to approximately the knee, are also stuffed. The remainder of the extremities are composed of porcelain. The doll is clothed in a traditional one piece, footed pajama outfit.

The second sample is marketed as "Teatime for Emma." The Emma doll is approximately 16.5 inches (42 cm) in height. This doll also represents a little girl and has a porcelain head and face with molded or implanted facial features. The head is ornamented with synthetic hair styled in a bun. The porcelain of the head extends past the neck into a short harness, that, like the Emma doll, overlaps a portion of the traditionally stuffed torso, front and back. The entire torso is stuffed to distention, and a large majority of the torso is not covered by the overlay. The arms are composed of porcelain. The doll is clothed in a silk tea dress and carries a small wicker basket containing two small plates and cups.

It is your contention that both dolls should be classified under subheading 9502.10.2000, HTSUSA, the provision for stuffed dolls and parts and accessories thereof, which will entitle the dolls to duty-free entry.

Issue:

Whether the Katie and Emma dolls should be classified as stuffed dolls or as dolls that are other than stuffed?

Law and Analysis:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI's). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the

headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The proper heading in this case is clear, i.e. Heading 9502 for dolls; the subheadings at issue differentiate between stuffed dolls and those that are not stuffed. Therefore, only reference to GRI 1 is necessary here as a determination of what constitutes a stuffed doll is dispositive of the issue.

The Tariff Schedule provides in Heading 9502 for the classification and rate of duty of dolls representing only human beings and parts and accessories thereof imported into the United States. Any doll classified in subheading 9502.10.2000, HTSUSA, as "stuffed" is entitled to duty-free treatment by virtue of subheading 9902.95.01, HTSUSA, which suspends the duty on stuffed dolls until December 31, 1992. Ordinarily, any doll determined to be "other than stuffed" would be classified in subheading 9502.10.40, HTSUSA, if not over 33 cm in height, subheading 9502.10.60, HTSUSA, if capable of electromechanical movement of body parts, or subheading 9502.10.80, HTSUSA, if not provided for by the foregoing provisions. All three provisions are subject to a duty rate of 12% *ad valorem*. Dolls classified within these latter three provisions also could be entered free of duty under the Generalized System of Preferences (GSP), the Caribbean Basin Economic Recovery Act (CBERA), or the United States-Israel Free Trade Agreement if applicable regulatory requirements are met.

In light of the foregoing, it is necessary that Customs have some criteria in place to make a distinction between stuffed and non-stuffed dolls. The problem in determining whether or not dolls are stuffed arises primarily in two instances: (1) when the dolls have a stuffed torso, but also have porcelain harnesses (or harnesses constructed of any "hard" material) which are attached to the head and neck and extend downward to cover a portion of the upper torso, and (2) dolls which have internal mechanisms (musical devices, etc.), or non-traditional stuffing material items included in the torso. In some instances, a combination of (1) and (2) will occur.

Over the past several years, the Customs Service has been involved with various importers on the issue of the definition of stuffed dolls. Because of the complexities involved in resolving this issue, approximately nine (9) months ago the Customs Service concluded it would be best to publish a notice in the Federal Register soliciting public comment on the definition of stuffed dolls. Shortly thereafter, an amendment to HR 1705, a bill to extend for three (3) years the existing suspension of duty on stuffed dolls and to define stuffed dolls was proposed in Congress. At a Ways and Means Committee markup on various miscellaneous trade measures, a dialogue occurred between the Committee and the Customs Service representative concerning this matter. Customs testified that the agency concurred in the opinion of various doll importers that the current definitional "tests" were very subjective and that the subjectivity resulted in a number of administrative problems for both Customs

and the importers. Customs indicated that the agency would welcome any clarification. The Committee requested that the Customs Service bring together the various entities involved in this matter to resolve this issue and to reach a consensus definition. In the weeks following that request, numerous discussions and meetings were held with representatives of the trade, other Government agencies and Congressional members and their staffs during which the various parties evolved a definition of stuffed dolls as applied by the trade. This definition, which Customs herein adopts as its position on the matter, states that a doll will be classified as "stuffed" if:

(a) the torso (which in this use means the body of the doll from the bottom of the neck to the groin) is, in whole or in part, manufactured to contain either:

(i) traditional stuffing material, which includes natural or synthetic textile materials,

(ii) filling material, which includes pellets, beans, or crushed nutshells, or

(iii) any combination of the stuffing or filling material referred to in (i) and (ii);

(b) any insert in the doll, which may include a mechanism voice unit, sound device, head stabilizer, music box, battery pack, or similar device, or compartment in which a person's hand can be placed, is covered by the stuffing or filling material referred to in (a) on at least 3 of the 4 sides of the torso;

(c) at least a portion of the skin of the torso is constructed of soft or pliable material or fabric; and

(d) any hard-surface harness, chestplate, or backplate making up or over a portion of the body of the doll does not extend below half of the distance from the bottom of the neck to the bottom of the groin.

Examination of the samples submitted to this office and application of the above definition indicates to us that the dolls should be classified as stuffed dolls under subheading 9502.10.2000, HTSUSA. The entire torso of each doll is stuffed to distention with traditional stuffing material and covered in a skin of soft fabric. The chestplates and backplates of the dolls extend considerably less than "half of the distance from the bottom of the neck to the bottom of the groin." These dolls possess no internal mechanisms.

Holding:

The two dolls at issue, marketed as "Katie's Bedtime Story" and "Teatime for Emma", are properly classified under subheading 9502.10.2000, HTSUSA, the provision for dolls representing human beings and parts and accessories thereof, dolls, whether or not dressed,

stuffed. The duty on this merchandise is temporarily suspended under subheading 9902.95.01, HTSUSA.

NYRL 847062 is hereby revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.



United States Court of International Trade

One Federal Plaza
New York, N.Y. 10007

Chief Judge
Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson
Herbert N. Maletz
Bernard Newman
Samuel M. Rosenstein
Nils A. Boe

Clerk

Joseph E. Lombardi



Decisions of the United States Court of International Trade

(Slip Op. 92-88)

A.T. CLAYTON & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 90-05-00234

MEMORANDUM OPINION AND ORDER

Plaintiff moves to designate this action as a test case and suspend four other actions thereunder.

Held: Plaintiff's motions for test case designation and suspension are granted. The court, *sua sponte*, suspends eight other actions under the test case.

(Dated June 11, 1992)

Serko & Simon (Leibert L. Greenberg), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice, (*James A. Curley*) for defendant.

DiCARLO, *Chief Judge*: Plaintiff, without objection from defendant, moves pursuant to USCIT R. 84, to designate this action as a test case and to suspend four other actions under it. At issue is whether plaintiff has satisfied the criteria for test case designation and suspension. Based on the facts presented, the court grants plaintiff's motions to designate this action as a test case and suspend the four actions listed on Schedule A under the test case. The court also *sua sponte* suspends eight other actions listed on Schedule B, brought by plaintiff involving the same merchandise and competing tariff provisions, under the test case.

BACKGROUND

Plaintiff challenges the classification of certain carbonless copy paper imported from Germany. The Customs Service classified the merchandise as coated writing paper under TSUS item 254.5600 for those entries made on or before December 31, 1988. For entries made thereafter, Customs classified the merchandise as self-copy writing paper under HTSUS item 4809.20.20. Plaintiff claims the merchandise is classifiable as other coated paper not specially provided for under TSUS item 254.8020, or other self-copy paper under HTSUS item 4809.20.40, depending upon the date of importation.

After issue was joined, plaintiff, without objection by defendant, filed motions for test case designation and suspension. Plaintiff maintains that "the issues of fact and law are identical* * * to the issues present in

at least 435 entries* * * involving [the proposed test case and] seven other cases filed in this Court by plaintiff's attorneys." Plaintiff alleges that the central issue is the proper classification of the carbonless copy paper. The granting of both motions, according to plaintiff, will "serve the interests of judicial economy by relieving the Court and the parties of the burdensome task of trying the same matters repeatedly."

DISCUSSION

The requirements of the test case/suspension procedure are provided for in USCIT R. 84. In *Generra Sportswear, Inc. v. United States*, 16 CIT ___, Slip Op. 92-62 (Apr. 28, 1992), the court set forth the criteria to be considered in determining the appropriateness of test case designation and suspension.

As in *Generra*, plaintiff's motions here appear to satisfy the requirements of USCIT R. 84 for test case designation and suspension. Nevertheless, in view of the representation of the parties that the issues of fact and questions of law in the four actions were "identical" with the proposed test case, the court asked counsel why consolidation, under USCIT R. 42(a), was not appropriate for these actions. In addition, the court, in exercising responsibility to manage its docket, identified eight other pending actions filed by plaintiff involving the identical merchandise and competing tariff provisions. See *Men's Wear Int'l, Inc. v. United States*, 13 CIT 817 (1989). Accordingly, the court asked counsel to comment on the appropriateness of consolidating these eight actions with the five actions subject to plaintiff's motions, or alternatively, including them in an order granting suspension.

In response to the court's request, plaintiff states that it is not opposed to consolidation, provided it has adequate time to prepare a consolidated complaint. Plaintiff, however, does point out that the five actions, which are the subject of the motions, involve "a large number of entries" and "arise from several ports of entry." As to the eight other actions, plaintiff acknowledges that they involve the same merchandise and classification issue as the actions in the motions for test case designation and suspension.

The Government asserts that there are 533 entries involved in the 13 actions. Under these circumstances, it argues that the test case/suspension procedure is preferable to consolidation. The Government maintains that consolidation is inappropriate because it would result in "a considerable undertaking" to review each entry to determine the similarity of the merchandise and the existence of jurisdictional defects, if any. With consolidation, the Government claims that it would have to raise jurisdictional defenses on an entry-by-entry basis in its answer. In fact, it raised a jurisdictional defense, which resulted in the severance and dismissal of 25 of the 37 entries in this action. From this, the Government contends that it is "reasonable to assume that there could be hundreds of such entries in the remaining cases" with a similar jurisdictional defect. Lastly, the test case/suspension procedure, in the Govern-

ment's view, "would obviate the need to undertake additional work on the 533 entries at this time."

Even though the parties agreed to the designation of a test case and the suspension of four actions thereunder, the court has an "independent responsibility to exercise its judicial discretion" in considering plaintiff's motions. *Generra*, 16 CIT at ___, Slip Op. at 6.

In deciding whether test case designation and suspension or consolidation is the appropriate procedure for resolving these cases, the court is guided by the considerations set forth in *Generra* and *PEG Bandage, Inc. v. United States*, 16 CIT ___, Slip Op. 92-63 (May 5, 1992). Specifically, the court is to determine which of the two alternate procedures will best "serve to achieve economies of time, effort and expense" and "promote uniformity of decisions", *Generra*, 16 CIT at ___, Slip Op. at 4, and whether the test case/suspension procedure or consolidation will "best avoid unnecessary costs or delays", *PEG Bandage*, 16 CIT at ___, Slip Op. at 4.

Consolidation appears to be the preferred procedure when, as a practical matter, it will "conserve time and expense for the court and the litigants." See *PEG Bandage*, 16 CIT at ___, Slip Op. at 5 (quoting *Morey Machinery Co. v. United States*, 69 Cust. Ct. 303, 305, 349 F. Supp. 1017, 1018 (1972)). On the other hand, the test case/suspension procedure is preferable when consolidation poses a "potential for an unwieldy and chaotic proceeding." *Id.* Among other factors to be considered in selecting the preferable procedure are the number of protests and entries involved, the number of ports of entry, and the degree to which either procedure will complicate discovery, burden the parties in trial preparation and strain judicial resources in conducting a trial. See *PEG Bandage*, 16 CIT at ___, Slip Op. at 5.

The court finds that, under the *Generra* criteria, this action is appropriate for test case designation, and that the parties have shown that the four actions in which suspension is sought have the identical question of law in common with the test case. Moreover, they have shown to the court's satisfaction that the entries and ports involved are so numerous that consolidation is impractical in these circumstances. Accordingly, the test case/suspension procedure is the preferable procedure here because it provides an orderly mechanism for the resolution of the actions that share the common issue with the proposed test case.

The court finds that the eight other actions, which it identified, are identical in all material respects to this action (the proposed test case) and the four actions in which suspension is sought. In these circumstances, the promotion of judicial economy and the furtherance of the court's independent responsibility to manage its docket call for the court to *sua sponte* order the suspension of the eight other actions under this action.

Accordingly, it is hereby

ORDERED that plaintiff's motion for test case designation is granted and that Court No. 90-05-00234 is designated a test case; and it is further

ORDERED that plaintiff's motion for suspension is granted and that the actions listed on Schedule A attached to this Memorandum and Order are suspended under Court No. 90-05-00234; and it is further

ORDERED that the actions listed on Schedule B attached to this Memorandum and Order are sua sponte suspended under Court No. 90-05-00234; and it is further

ORDERED that the parties will submit a proposed scheduling order pursuant to USCIT R. 16, within 60 days from the date of this order, that limits the time for submission of the test case for final disposition.

SCHEDULE A

Calendar	Plaintiff	Court No.
March 1992 Reserve	A.T. Clayton & Co., Inc.	91-03-00230
March 1992 Reserve	A.T. Clayton & Co., Inc.	91-03-00237
March 1992 Reserve	A.T. Clayton & Co., Inc.	91-03-00238
March 1992 Reserve	A.T. Clayton & Co., Inc.	91-03-00239

SCHEDULE B

Calendar	Plaintiff	Court No.
August 1992 Reserve	A.T. Clayton & Co., Inc.	90-08-00398
October 1992 Reserve	A.T. Clayton & Co., Inc.	90-10-00539
October 1992 Reserve	A.T. Clayton & Co., Inc.	90-11-00590
June 1992 Reserve	A.T. Clayton & Co., Inc.	90-12-00683
June 1992 Reserve	A.T. Clayton & Co., Inc.	90-12-00685
September 1992 Reserve	A.T. Clayton & Co., Inc.	91-09-00679
September 1992 Reserve	A.T. Clayton & Co., Inc.	91-09-00710
March 1993 Reserve	A.T. Clayton & Co., Inc.	92-03-00153

ABSTRACTED CLASS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASS
C92/117 6/11/92 Goldberg, J.	Mepco/Electa, Inc.	90-10-00500	682.55 Variou
C92/118 6/11/92 Musgrave, J.	Turtle Bay Ind.	81-12-01613	Various of Sch
C92/119 6/15/92 Goldberg, J.	Liz Claiborne Accessories, Inc.	90-11-00576	4202.32 20%
C92/120 6/15/92 Goldberg, J.	Liz Claiborne Accessories, Inc.	91-3-00233	4202.32 20%

CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
or 682.25 Various rates	682.60 Various rates	Agreed statement of facts	West Palm Beach Coils assemblies
us provisions Schedule 3	376.56 Various rates	Agreed statement of facts	New York Various styles of outerwear garments
42.20	4202.32.10 12.1¢/kg. + 4.6%	Agreed statement of facts	New York Various styles of flat goods
42.20	4202.32.10 12.1¢/kg. + 4.6%	Agreed statement of facts	New York Various styles of flat goods



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